No. 80-1852

JUN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. McGOFF, GLOBAL COMMUNICATIONS CORPORATION AND SACRAMENTO PUBLISHING COMPANY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONERS

RAYMOND G. LARROCA
(Counsel of Record)
JAMES E. ROCAP, III
SUZANNA SHERRY
MILLER, CASSIDY, LAROCCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioners

THE CASILLAS PRESS, INC.–1717 K Street N. W.–Washington, D. C.–223-1220

PARTIES

A list of the parties, including a list of subsidiaries and affiliates of Global Communications Corporation and Sacramento Publishing Company, may be found on page ii of the Petition for Certiorari.

TABLE OF CONTENTS

Page

PARTIES i

TABLE OF AUTHORITIES iii

ARGUMENT 1

1. The Basis For The Commission's Subpoena 1

2. There Remains A Live Controversy For Disposition By This Court 3

3. No Case Cited By The Commission Undermines Petitioner's Assertion That The Subpoena Must Be Tested Under The Strict Scrutiny Standard Applicable to Governmental Actions That Impinge on First Amendment Freedoms 4

4. The Lower Court's Decisions Denying Discovery Are in Conflict With The Decisions of Other Circuits 5

5. The Matters Sought To Be Discovered Are Not Privileged 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Branzburg v. Hayes, 408 U.S. 665 (1972) 4, 5

Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) 5

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 8

FTC v. Browning, 435 F.2d 96 (D.C. Cir. 1970) 3

FTC v. Gibson Products of San Antonio, Inc., 569 F.2d 900 (5th Cir. 1978) 3

PRECEDING PAGE WAS BLANK

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) 4, 5

Lyons v. City of Los Angeles, 615 F.2d 1243 (9th Cir.), *cert. denied*, 101 S.Ct. 333 (1980) 3

NAACP v. Alabama, 357 U.S. 449 (1958) 4

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 8

Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979) 4

SEC v. Wheeling-Pittsburgh Steel Corp., No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc) 6, 7

United States v. Fensterwald, 553 F.2d 231 (D.C. Cir. 1977) 6

United States v. Church of Scientology, 520 F.2d 818 (9th Cir. 1975) 6

United States v. Morgan, 313 U.S. 409 (1941) 8

United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969) 6

United States v. Salter, 432 F.2d 697 (1st Cir. 1970) 6

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 3

United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir. 1976) 6

Zerilli v. Smith, No. 79-2466 (D.C. Cir. April 13, 1981) 4

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 4

Constitutional Provisions:

First Amendment 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1852

JOHN P. McGOFF, GLOBAL COMMUNICATIONS CORPORATION AND SACRAMENTO PUBLISHING COMPANY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The Basis For The Commission's Subpoenas.

The Commission in its opposition makes several statements about the basis for the Commission's investigation and its subpoenas, Brief in Opp. at 2-3, that require clarification.

First, the Commission states that it had received information "indicating that petitioners acquired approximately 40% of Panax's outstanding stock . . . without making the disclosures required by the federal securities laws." Brief in Opp. at 2. To support this statement, the Commis-

sion suggests that the Erasmus Report alleged that Petitioners used funds from South African sources to purchase Panax stock. Brief in Opp. at 2-3 & n.2. In fact, the Report alleges that the money was to be used solely for three specific transactions: (1) attempted acquisition by Petitioner McGoff of the *Washington Star* (A. 154, ¶10.22); (2) the purchase of a 50% share in UPITN, a London-based news agency (A. 154, ¶10.28); and (3) the purchase and operations of the *Sacramento Union* (A. 154, ¶10.27). *Nowhere* in the Report is Panax or Panax stock mentioned. The Erasmus Report simply does not support, and in fact refutes, the allegations that any South African funds were used to purchase Panax stock.[1]

Second, the Commission states that the Erasmus Report alleges that Petitioner received South African funds "for the purpose of purchasing interests in news organizations." Brief in Opp. at 6 n.5. In fact, the citation to the record used to support this statement is a citation not to the Report itself, but to the *affidavit of an SEC officer,* filed in connection with the subpoena enforcement proceedings before the district court. The Erasmus Report, however, upon which the Commission relied, only claims that South African funds were advanced to purchase a particular newspaper, the *Washington Star* (A. 153), and that when that fell through, the *Sacramento Union* and a part interest in UPITN were purchased instead (A. 154). Again, there was *no* link to Panax or

[1]The Commission attempts to broadbrush this glaring omission in the Report by stating that "shortly after" allegedly receiving the South African funds, petitioner "began making substantial purchases" of Panax stock. Brief in Opp. at 2-3 n.2. But the Commission's own records show that no "substantial" purchase of Panax stock was made until February, 1976, almost *one and one-half years* after the alleged receipt of South African funds. A. 183-188.

Panax newspapers in any of the information upon which the Commission relies.

Third, the Commission characterizes its subpoenas as calling for production of documents pertaining to "the persons who had advanced funds to petitioners," Brief in Opp. at 3. In fact, the subpoenas asked for documents pertaining to categories of persons far broader than that, with a far greater impact on Petitioners' associational rights:

> the Republic of South Africa or any of its political subdivisions, governmental officials (whether or not in their official capacity) political candidates or political parties.

Pet. App. 21a, 30a, 35a; *see also id.* at 22a-23a, 31a-32a, 36a-37a.

2. There Remains A Live Controversy For Disposition By This Court.

The Commission recognizes that this case is not moot, Brief in Opp. at 7 & n.6, but argues that any opinion by this Court would be "devoid of . . . practical significance." However, if this Court were to decide this case in Petitioners' favor, Petitioners would be entitled to the return of the documents and the exclusion of information they contain in any subsequent proceedings. *See FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *FTC v. Browning,* 435 F.2d 96, 97-98 & n.1 (D.C. Cir. 1970). *See also* Pet. App. 7a n.4. Moreover, the public interest in having the parameters of agency authority definitively settled weighs heavily against finding the case moot. *See United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *Lyons v. City of Los Angeles,* 615 F.2d 1243, 1248 n.10 (9th Cir.), *cert. denied,* 101 S.Ct. 333 (1980).

3. No Case Cited By The Commission Undermines Petitioners' Assertion That The Subpoena Must Be Tested Under The Strict Scrutiny Standard Applicable To Governmental Actions That Impinge On First Amendment Freedoms.

Contrary to the Commission's contention, Petitioners do not assert that they are entitled to special consideration only because they are "engaged in the publishing business." Brief in Opp. at 8. They also assert that the subpoena infringes on their First Amendment rights of *association,* by requiring them to disclose relationships and dialogues with certain named individuals and other entities. The Commission cites no case that holds that such infringement may be permitted without the searching inquiry required under *NAACP v. Alabama,* 357 U.S. 449 (1958), and its progeny. *Branzburg v. Hayes,* 408 U.S. 665 (1972), decided only that reporters' rights under the First Amendment are not unqualified. *See Zerilli v. Smith,* No. 79-2466, slip op. at 12-14 (D.C. Cir. April 13, 1981); *Riley v. City of Chester,* 612 F.2d 708, 714 (3d Cir. 1979). Moreover, *Branzburg* did not deal with the associational aspect present in this case. *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978), likewise rejected only a "nearly *per se*" ban against search warrants directed to newspaper publishers, 436 U.S. at 563; in fact, this Court in *Zurcher* reaffirmed that where First Amendment interests are at stake, the Fourth Amendment must be applied with "scrupulous exactitude." *Id.* at 564.

The Commission's attempts to distinguish or undermine the cases relied upon by Petitioners also must fail. The fact that *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), "did not involve entities or persons who themselves were suspected of having engaged in unlawful conduct," Brief in Opp. at 10 n.9, does not alter

the standard to be applied, but merely constitutes a factor to be considered in determining whether a compelling governmental interest has been shown. 372 U.S. at 547-48. Nor is the fact that "this case does not involve compelled disclosure of the identity of members of or contributors to political organizations," Brief in Opp. at 10 n.9, dispositive. This Court held in *Gibson* that it is "the claim . . . that particular . . . inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals," and not the manner of that infringement, which warrants the close scrutiny of the subpoena. 372 U.S. at 545. *Branzburg v. Hayes,* 408 U.S. 665 (1972) did not eviscerate the test announced in *Gibson* insofar as associational rights are involved. *See* p. 4, *supra; see also, Bursey v. United States,* 466 F.2d 1059, 1091 (9th Cir. 1972) (*Branzburg* "does not purport to disavow the balancing standards enunciated" in *Gibson*). Finally, the Ninth Circuit's decision in *Bursey* directly conflicts with the decision in this case. The Commission's suggestion that *Branzburg* superseded *Bursey,* Brief in Opp. at 10-11 n.9, is incorrect: the Ninth Circuit reconsidered its decision after *Branzburg,* and concluded that *Branzburg* was "not inconsistent with either our reasoning or the result we have reached." 466 F.2d at 1090.

4. The Lower Courts' Decisions Denying Discovery Are In Conflict With The Decisions of Other Circuits.

We contend that the standard for allowing discovery against a governmental agency applied by the court of appeals in this case is in direct conflict with the standards enunciated by at least four other circuits. *See* Pet. at 9-10. The First, Fifth and Ninth Circuit cases cited by the Commission to support its contention that no conflict exists,

Brief in Opp. at 12 n.11, in fact all recognized that the subpoena recipient "must be afforded at least *some* opportunity to substantiate its allegations," and thus all allowed at least limited discovery. *United States v. Church of Scientology,* 520 F.2d 818, 824-25 (9th Cir. 1975) (emphasis in original); *accord, United States v. Salter,* 432 F.2d 697, 700-01 (1st Cir. 1970); *United States v. Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969).[2] Moreover, the Commission's statement that "[i]n none of the cases cited by petitioners did the courts find that the government voluntarily came forward . . . with specific and undisputed evidence," Brief in Opp. at 13 n.13, is incorrect. In *United States v. Roundtree* the court found that the Commission had "denied [the] allegations and submitted affidavits to buttress its position." 420 F.2d at 851.

In particular, the Commission's attempt to distinguish *SEC v. Wheeling-Pittsburgh Steel Corp.,* No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), is unsuccessful. The Com-

---

[2]In the First and Ninth Circuits, the appropriate discovery procedure is an evidentiary hearing at which the party challenging the subpoena is permitted to take the testimony of agency personnel. *United States v. Church of Scientology, supra; United States v. Salter, supra.* In the Fifth Circuit, the appropriate procedure is either an evidentiary hearing, *United States v. Wright Motor Co.,* 536 F.2d 1090 (5th Cir. 1976), or taking the depositions of agency personnel, *United States v. Roundtree, supra.* In the District of Columbia Circuit, however, the appropriate procedure is interrogatories to the agency. *United States v. Fensterwald,* 553 F.2d 231 (D.C. Cir. 1977). Thus, counsel for Petitioners did not – as the Commission would have the Court believe – "decline[ ] the invitation of the district court to present facts and arguments at the adversarial hearing," Brief in Opp. at 14 n.14, but rather followed the procedures authorized by the District of Columbia Circuit by submitting interrogatories instead. Indeed, there was *no* "invitation" by the district court "to present facts" at the hearing on the motion to quash.

mission characterizes the challenge to the subpoena in *Wheeling-Pittsburgh Steel* as based on "improper influence by a particular United States Senator," Brief in Opp. at 13 n.12. The only difference between our allegations and those in *Wheeling-Pittsburgh Steel* is that we are unable to name the individual or individuals in the administration who may have influenced the Commission's determination to begin an investigation. We have, however, described circumstances that suggest both a strong likelihood that such an individual exists and a powerful motivation for the harrassment of Mr. McGoff. *See* Pet. at 5-6, 12-13 & n.10.

Finally, the Commission's brief demonstrates that it has engaged in the same implicit presumption that the court of appeals did: that Petitioners must demonstrate bad faith or malicious intent on the part of the agency in order to quash the subpoena. Both the Commission and the court of appeals respond to Petitioners' allegations by pointing to the Erasmus Report as negating any malicious intent, and do not attempt to explain the simultaneity of the Government's investigations. In fact, as the Third Circuit recognized in *SEC v. Wheeling-Pittsburgh Steel,* the subpoena may be invalid even if the agency merely acted at the behest of an outsider without itself making an independent determination that the investigation was warranted. That the investigation may also have been justified on the basis of underlying facts does not excuse the agency from making that independent determination.

5. The Matters Sought To Be Discovered Are Not Privileged.

The Commission argues, for the first time in these proceedings, that the discovery sought by Petitioners would infringe upon the "privileged area of the administrative

deliberative process," Brief in Opp. at 15. The cases cited by the Commission in support of this contention, however, are wholly inapposite. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), for example, involved an FOIA request, and this Court explicitly noted that discovery unavailable under exemption 5 to the FOIA might still be available to some litigants. 421 U.S. at 149 n.13. *United States v. Morgan*, 313 U.S. 409 (1941), from which the Commission provides copious quotations, *see* Brief in Opp. at 15 n.16, involved rate fixing by the Secretary of Agriculture. Moreover, *Morgan* has been qualified and interpreted by this Court's more recent pronouncement in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Court held that the "presumption of regularity" accorded government processes could not be used to "shield [those processes] from a thorough, probing, in-depth review." 401 U.S. at 415. The Court explicitly limited *Morgan*, rejecting any *per se* prohibition on inquiries into mental processes. *Id.* at 420.

CONCLUSION

For the foregoing reasons, and those stated in our Petition for Writ of Certiorari, the Writ should be granted and the decision of the United States Court of Appeals for the District of Columbia reversed.

Respectfully submitted,

RAYMOND G. LARROCA
(Counsel of Record)
JAMES E. ROCAP, III
SUZANNA SHERRY
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioners

June, 1981